No. 2858

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

GIN DOCK SUE,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff and Appellee.

REPLY BRIEF FOR APPELLANT

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In the brief upon behalf of the Appellee (P. 19) reference is made to the case of *Chin Fong* vs. *Backus,* 241 U. S. 1, as upholding the contention of the Government that a legal residence cannot be founded upon a long prior irregular entry. We do not so construe that decision. In the Chin Fong case the appeal was taken direct to the Supreme Court upon the theory that the construction of a treaty was involved and this the jurisdictional point being adversely decided, the court, speaking through Mr. Justice McKenna, did not find it necessary to decide the other points involved. The Court said:

> "No provision of the treaty is cited from which the contention is an applicable deduction, nor are we disposed to quote and comment on the entire treaty in answer to the contention. See 22 Stat. at L 826; also *Lau Ow Bew* vs. *United States,* supra. The 'merchant' defined by it does not include petitioner. It was the definition of the status acquired in China, not acquired in the

United States, and, having been acquired in China, gave access to the United States, and after access freedom of movement as citizens of the most favored nations. And this privilege was given as well to Chinese laborers then (1880) in the United States. We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty, and that the rights of petitioner can rest only upon the statutes regulating Chinese Immigration. So concluding we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal, and whether he could acquire by either a status which the immigration officers were without power to disregard.

Dismissed."

In our opening brief we advanced the claim that the prosecution of this deportation proceeding against this defendant, he having been a merchant for seven years and a half, and an official since November 1913, was barred by the Statute of Limitations. On page 22 of the brief we referred to the limitation contained in the General Immigration Law, and on page 40 we referred to the general statute of Limitations. Upon the argument this last mentioned contention was elaborated upon, and permission granted to file a reply brief thereon.

A deportation proceeding has been held to be not a criminal proceeding. Sec. 4 of the Act of May 5,

1892 (27 Stat., p. 25.) entitled "AN ACT TO prohibit the coming of Chinese persons into the United States" provides as follows:

> "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States as hereinbefore provided."

Sec. 6 of said Act provided for the registration of Chinese laborers.

Two Chinese deportation cases arising under the provisions of these sections were carried to the Supreme Court of the United States, and it was there held that such a deportation case was not a criminal proceeding, and in the latter of the two cases that the provision of this section which imposed a punishment, was void.

Fong Yue Ting vs. *U. S.* 149 U. S. 730.

Wong Wing vs. *U. S.* 163 U. S. 228.

The ruling in the above entitled cases amply covers these Chinese deportation proceedings, and stamps them as not criminal proceedings but civil proceedings. The Revised Statutes of the United States have made the laws of the various states the rules of decision in the United States Courts situate within the respective states. Section 721 of the Revised Statutes provides as follows:

"The laws of the several states, except where

the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Under the provisions of Section 721, of the Revised Statutes of the United States, we advance the contention that when a deportation proceeding against a Chinese person is brought within the limits of the State of California, that the Statute of Limitations provided by the laws of the State of California apply, govern and control the decision of the United States Courts. Before giving the citations upon this point, we desire to explain this observation by the statement that we do not refer to a case where the defendant is a laborer at the time of his arrest, for, as set forth in our opening brief, we concede that to be a continuous violation of the statute, but we do mean it to apply to a case in which the defendant is not a laborer at the time of his arrest, and who has not been such a laborer in excess of the period covered by the Statute of limitations, thus enabling such a defendant to claim the exemption therein sought. At the outset, it is of course, maintained, that the General Immigration Law contains its own limitations, that such a deportation proceeding must be commenced within three years after the irregular entry. The Chinese Exclusion and Restriction Acts are silent as to the time within which such a person may be arrested and deported.

The Statute of Limitations provided in the Code

of Civil Procedure of the State of California which we contend are applicable to this matter are contained in the following sections:

"C. C. P. of Cal. Section 335. *Periods of Limitation prescribed.* "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows." C. C. P. of Cal., Section 338. "Within three years.

"1. An action upon a liability created by statute, other than a penalty of forfeiture." C. C. P. of Cal., Section 340. "Within one year.

"1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state except when the statute imposing it prescribes a different limitation."

"2. An action upon a statute or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state."

"Section 345: *Actions by the people subject to the limitations of this chapter*: "The limitations prescribed in this chapter apply in actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties, except that actions for the recovery of money due on account of the presence of patients at the state hospitals may be commenced at any time within three years after the accrual of the same."

It is obvious that if the foregoing provisions limiting the time within which such actions can be com-

menced are applicable to proceedings in the United States Courts, that this must dispose of the issue in favor of the defendant. That must therefore be our next inquiry. In the case of *Campbell* vs. *City of Haverhill,* 155 U. S. 610, the court held, Mr. Justice Brown speaking:

> "The argument in favor of the applicability of state statutes is based upon Rev. St. 721, providing that 'the laws of the several states except,' etc. 'shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' That this section embraces the statutes of limitations of the several states has been decided by this court in a large number of cases, which are collated in its opinion *Bauserman* vs. *Blunt,* 147 U. S. 647, 13 Sup. Ct. 466. To the same effect are the later cases of *Metcalf* vs. *Watertown,* 153 U. S. 671, 14 Sup. Ct. 947, and *Balkam* vs. *Iron Co.,* 154 U. S. 177, 14 Sup. Ct. 1010. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.
>
> "It is insisted, however, that, by the express terms of section 721, the laws of the several states should be enforced only 'in cases where they apply,' and that they have no application to causes of action created by congressional legislation and enforceable only in the Federal courts." * *

"But as no such discrimination is attempted by this statute, and no claim made that the time was unreasonably limited, the point need not be further noticed." * * * * *

"Unless this be the law, we have the anomally of a distinct class of actions subject to no limitation whatever,—a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams* vs. *Woods,* 2 Cranch, 336 342, of a similar statute: 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.' Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the

witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story, (*Bell* vs. *Morrison* 1 Pet. 351, 360): 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.' This language is peculiarly applicable to patent cases, in which questions of anticipation frequently rest in oral testimony only, and are required to be proved to the satisfaction of the court by something more than a mere preponderance of evidence." * * * * * The truth is that statutes of limitation affect the remedy only and do not impair the right, and that the settled policy of congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states." * * * * * "In fine, we are of the opinion that the statute of limitations was a good plea to this action, and the judgment of the circuit court is therefore affirmed."

A consideration of the foregoing decision leaves us with two points in section 721 of the Revised Statutes, to be considered. The first is with respect to the treaty obligations, and the second is *in cases where they apply.*" With respect to the treaty obli-

gations attention only need be directed to the treaty between the United States and China, concerning immigration, of November 17, 1880, and this may be covered by reciting the first three articles of the treaty:

Article 1. "Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

Article 2. "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded

all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations."

Article 3. "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

It is apparent from the above that legislation is only authorized against Chinese laborers, and that all other classes are not to be the subject of any limitation. Justice Harlan in the case of *Chew Heong* vs. *United States* 112 U. S. 536, states as follows:

"For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions should be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty."

It is apparent from this citation to the treaty, and the decision of the Supreme Court of the United States that there is nothing in the treaty obligations

of the United States which precludes the application of Section 721 of the Revised Statutes.

The only remaining point to be touched upon is that phrase in the Statutes *"in places where they apply."* It has always been a part and parcel of the Immigration Laws of the United States that a person who surreptitiously enters our territory or effects an entrance in an irregular way, must be deported within a specified time. The General Immigration Laws of the United States have always contained such a limitation. On pages 22, 23 and 24 of our Opening Brief in this matter, we set forth three different cases, each exemplifying the law, where the period of limitation therein mentioned was respectively one, two and finally three years. The limitation contained in the present Immigration Laws provides that a certain class of disreputable aliens may be deported at any time when they are found in the United States, following a prescribed occupation, that is,—prostitution, or anything which is kindred thereto. The limitation of three years, however, does apply in the cases of surreptitious or irregular entry, or entry without inspection. Hence we are brought face to face with the conclusion that there is nothing in the idea of a limitation for merely an irregular entry which in itself is at all inapplicable or repugnant to the phrase *"in places where they apply."* It is shown to have been a fixed policy of the Immigration Laws, to have a limitation placed upon the time within which a person who enters in an irregular manner, may thereafter be deported. The theory of this un-

doubtedly is that if such an alien enters and does not render himself obnoxious, and becomes absorbed in the mass of our population and remains so absorbed for the period of the limitation, that he cannot be then considered as a person so objectional to life within the United States, as to be thereafter deported. The Chinese exclusion and restriction acts were aimed at Chinese laborers, and not members of the exempt classes. This defendant and appellant is a merchant and is a Chinese official, as shown by the record in this case, and it is repugnant to American ideas of the equities of the situation that he should be forever hounded, because of the irregular manner of his re-entry into the United States. The defendant and appellant was, by occupation, a cigar vendor, and owned a lot of property among which was an interest in a vegetable garden outside of Los Angeles. He accordingly, applied for a Laborer's departure certificate, qualifying therefore as to the necessary amount of property in this country, and the fact that he had a wife living here, and also filed his certificate of residence. His certificate of residence described him as a *person other than a laborer,* giving his occupation as a *pawn broker,* and according to the technical ideas of the person in charge of the administration of these laws, they held that one registered as a *person other than a laborer* could not avail himself of the privileges of the ordinary laborer, hence this appellant was refused the right to go to China by classing himself a laborer. The Department officials subsequently changed their ideas, and now he

would be permitted to make such a trip as a laborer. The defendant and appellant accordingly, to make his trip to China, asserted a mercantile status, claiming an interest in a Chinese drug store. Upon his return his application was denied, claiming that he was not technically a merchant, and that he should have made the trip as a laborer, which is the very thing which he originally tried to do. He was not absent from the territory of the United States for a greater period of time than the law would have permitted him if he had a laborer's departure certificate.

In finally submitting this matter to the consideration of this court, we feel that this defendant and appellant having been a Chinese merchant ever since his irregular re-entry into the United States, and having been a Chinese official, as shown in the testimony, that he is entirely exempt from the rigorous provisions of the Chinese exclusion or restriction acts, which are only authorized against Chinese laborers. There is no language more apt or more fitting in which to submit this matter to the court, than the language of the late Justice Field in the case of *Wong Wing* vs. *United States,* 163, U. S. 228; 16 Sup. Ct. 977:

> "The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar,—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Far nobler was the boast of the great French cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'

It is to be hoped that the poor chinaman, now before us seeking relief from cruel oppression, will not find their appeal to our public institutions and laws a vain and idle proceeding."

Respectfully submitted,

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Appellant.